



# Aspects of the Executive's Power Over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps

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# ASPECTS OF THE EXECUTIVE'S POWER OVER NATIONAL SECURITY MATTERS: SECRECY CLASSIFICATIONS AND FOREIGN INTELLIGENCE WIRETAPS

CHARLES R. NESSON†

## INTRODUCTION

The abrupt conclusion of the recent trial of Daniel Ellsberg was, in its way, disappointing. What was to have been a trial focused on the revelation of secret executive operations in Vietnam became a case history of secret executive operations on domestic soil. This meant that vital questions about the secrecy classification system on which the merits of the case turned would not be resolved: whether, for example, the government owns classified information in the same way it owns tangible property like jeeps and typewriters, and can control the dissemination of classified information by using the relatively absolute powers of property control. It meant also that everyone associated with the trial was denied the dramatic and emotional satisfaction of seeing almost two years of hard work brought to conclusion in a jury verdict.

Yet, the denouement of the Ellsberg case was a fitting illustration of something that had motivated Ellsberg to release the Pentagon Papers in the first place. The revelations of burglary and wiretapping of United States citizens on United States soil, wrapped in justifications of national security, and blanketed with the secrecy of covert paramilitary intelligence operations, showed how easily the unchecked corruption of the secrecy system could be made to serve justification for other more dangerous unchecked powers. It illustrated how readily the enormous powers we permit the President to exercise abroad under the cloak of secrecy can be turned to serve executive interests at home, and how, in the process, it can swallow fundamental liberties. The case, including its end, began to forge a link between Vietnam and Watergate from which a basic proposition should emerge: the inherent powers of the President to keep secrets and to operate in secret without check by the Judiciary or Congress have grown to proportions which threaten the constitutional balance, and must be brought under the rule of law.

Executive assertions of inherent national security powers call into question basic power allocations within the governmental framework,

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questions which fall for resolution to the judiciary. Judgments as to the legality of the assertions of such powers typically require the courts to resolve a conflict between executive arguments of necessity based on national security, on the one hand, and arguments of infringement of individual liberties and democratic principles, on the other.<sup>1</sup> Yet the conflict is not only one of substance, it is also one of competencies. While the Judiciary may suspect that the national security bureaucracy of the executive branch may undervalue the principles of the Bill of Rights, the executive branch questions the competence of the Judiciary to evaluate the needs of national security.

In fact, the evaluation of national security decisions is highly uncongenial to the judicial process. Fact finding in secret,<sup>2</sup> security clearances for lawyers, litigants,<sup>3</sup> and perhaps even judges,<sup>4</sup> and the breadth and diversity of possible inquiry, all make for nonjusticiability. Even if means can be jerrybuilt to produce a factual record, judges are in a poor position to evaluate it.<sup>5</sup> The nation may rest a measure of trust in the Judiciary's moral leadership, but none in the ability of judges to second guess the President and his generals on military and diplomatic matters where the nation's safety is concerned.

The Judiciary is thus faced with an apparent dilemma in judging the legality of asserted inherent national security powers. If the courts defer to executive competence in assessing the needs of national security, the effect may be to consign to the Executive the protection of individual liberties to which the national security bureaucracy may be insensitive. Yet the alternative of asserting the primacy of individual liberties requires the Judiciary, either implicitly or explicitly, to take on the uncongenial task of evaluating the asserted needs of national security and saying that the President is wrong.

One tool employed by the Judiciary to assess the President's inherent power over national security matters is to inquire into the ability of

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1. *E.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

2. Most of the evidentiary record in *New York Times Co. v. United States*, 403 U.S. 713 (1971), is comprised of secret testimony and submissions. The record remains secret.

3. In *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), for example, where the Government was seeking to enjoin an ex-CIA agent from publishing a book, clearances were required for the lawyers and expert witnesses.

4. The Government comes close to suggesting this in its brief in *United States v. United States District Court*, 407 U.S. 297 (1972). Brief for United States at 24-25, *id.*

5. *New York Times Co. v. United States*, 403 U.S. 713, 757 (1971) (Harlan, J., dissenting).

Congress to regulate this expression of executive power. An asserted inherent power will necessarily fall into one of four conceptual categories. It must be: (1) a power legally exercisable by the executive branch, not subject in any way to control by Congress;<sup>6</sup> (2) a power which the Executive may exercise in the absence of congressional preclusion, but which Congress could regulate or preclude if it chose;<sup>7</sup> (3) a power which is not legally exercisable by the Executive unless authorized by Congress;<sup>8</sup> or (4) a power which cannot be exercised by the Executive, notwithstanding an attempted congressional authorization.

Explicit constitutional delegation of power to the President and explicit constitutional prohibition epitomize categories one and four. But the characteristics of asserted powers which would distinctively place them in the second category rather than the third, and vice versa, are not immediately clear. Yet the practical difference between a judicial judgment placing an asserted power in one or the other category may be enormous. That is to say, a judgment that the asserted power can be exercised by the Executive subject to possible future congressional regulation provides no immediate check to this power. It merely preserves a congressional option to create one. By contrast, a judgment that the power is one which can be exercised only with the authority of Congress may create an immediate check to the power, but on an intermediate basis which reserves the question of the long-term allocations of national security powers to the decisions of Congress. This means, in effect, that while the Judiciary is not fully competent to evaluate the needs of national security, Congress is. The result is to set the force of inertia against the asserted power. It places the burden of going forward on the executive branch, and, at the same time, insulates the Judiciary from the responsibility of second guessing the executive's national security assessment.

I want to focus in this article on the two specific inherent executive powers which were central to the Ellsberg case and consider the proper

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6. For example, the power to make strategic military decisions in wartime would be encompassed within the President's explicitly stated power as Commander-in-Chief. U.S. CONST. art. II, § 2.

7. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, the Supreme Court held that President Truman's seizure of the nation's steel mills exceeded the Executive's inherent constitutional powers, in part because he acted contrary to congressional policy expressed in the provisions and legislative history of the Taft-Hartley Act. See *id.* at 634-55 (Jackson, J., concurring). See also *New York Times Co. v. United States*, 403 U.S. 713 (1971), in which Justices White and Stewart rely on an evident past refusal of the Congress to authorize injunctive remedies against the press to deny the Executive an inherent power to seek such injunctions. *Id.* at 734, 740.

8. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 741-43 (1971) (Marshall, J., concurring).

judicial and congressional responses to their use: first, the power of national security secrecy classification, which got the case underway, and second, the power to use warrantless wiretaps in connection with foreign intelligence, which brought the case to its close. Each serves to illustrate the limitations of the Judiciary and the Congress to check executive national security powers. On the basis of my understanding of these two powers and their abuses, I conclude that notwithstanding the difficulties of doing so, it is essential for the courts and Congress to develop checks against them.

### SECRECY CLASSIFICATION

Secrecy classification theoretically restricts the dissemination of documents, the disclosure of which would injure national security.<sup>9</sup> The three most well known classification categories, listing from most to least restrictive, are Top Secret, Secret, and Confidential.<sup>10</sup> Let us assess the system on its strongest ground.

The classification Top Secret is limited by executive rule to information which could reasonably be expected to cause grave damage to the national security.<sup>11</sup> Information which would start wars or cause diplomatic breaks are cited as examples. The rules limit the number of persons empowered to make this determination to high echelon officers in the executive departments and agencies connected with national defense.<sup>12</sup>

These classification rules give the appearance of strict limitation, but they are wholly illusory. Most information is in fact classified by a process known as derivative classification.<sup>13</sup> This process effectively gives the

9. Exec. Order No. 11,652, § 1, 3 C.F.R. 375-76 (1973). This executive order was promulgated on March 8, 1973, and superseded Exec. Order No. 10,501 which governed the classification of the Pentagon Papers. Exec. Order No. 11,652 was intended to meet many of the criticisms of Exec. Order No. 10,501.

10. Exec. Order No. 11,652, § 1, 3 C.F.R. 375-76 (1973).

11. *Id.* § 1(A), 3 C.F.R. 376 (1973).

"Top Secret." "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; . . . This classification shall be used with the utmost restraint.

*Id.*

12. *Id.* § 2(A), 3 C.F.R. 377 (1973).

13. According to Mr. J. Fred Buzhardt, There are no data available subject to verification from which to determine the volume of information to which classification markings have been applied pursuant to classification guidance [derivative classification] . . .

*Hearings on U.S. Government Information Policies and Practices Before a Subcomm. of*

power of secrecy classification to any persons who are cleared to see documents in the respective classification categories. Whenever a person uses a Top Secret source in preparing a new document he is obliged to classify the new document according to the classification of his source of information.<sup>14</sup> Since documents must carry the highest classification of their component parts,<sup>15</sup> any document which uses a Top Secret source can itself be classified Top Secret. Classification is the responsibility of the man who prepares the new document. He is said to have derivative classification authority. Thus, any of the more than 450,000 persons in the government who have Top Secret classification clearances<sup>16</sup> are empowered to create Top Secret documents. In addition, since classification is typically both anonymous and nonspecific,<sup>17</sup> a user of a Top Secret source has no way of knowing what particular piece of information in the source document led to its being classified Top Secret. As a result, the derivative classifier will apply the Top Secret Classification to his product if he has used any information whatsoever from a Top Secret source.

As can be imagined, the process has its own peculiar malignancy. Since research and discussion on any subject naturally derive from and cite to the central literature on the subject, every classified document becomes a seed from which other classified documents can grow. If Blackstone had classified his commentaries Top Secret, then derivative

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*the House Comm. on Government Operations*, 92d Cong., 1st & 2d Sess. 2523 (1972) [hereinafter cited as *Hearings*].

14. Exec. Order No. 11,652, § 2, 3 C.F.R. 376-78 (1973), delegates authority to classify "originally." The current Executive Order nowhere defines any secondary or derivative authority. Section 6(C) provides: "Classified information and material shall be used . . . only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons." *Id.* § 6(C), 3 C.F.R. 383 (1973). This section appears to subsume the well established practices of derivative classification.

This is made explicit by the implementing regulations of the Department of Defense. DOD Directive, 32 C.F.R. §§ 159.202-9, -15 (1973). Section 159.202-15 provides: "Information or material extracted from a classified source will be classified . . . in accordance with the classification marking shown in the source." *Id.* § 159.202-15. Section 159.202-9 provides in part: "The overall classification of a document, file, or group of physically connected documents shall be at least as high as that of the most highly classified component." *Id.* § 159.202-9.

15. DOD Directive, *id.* § 159.202-9.

16. According to Department of Defense answers to questions by Senator Fulbright, DOD had 458,682 outstanding "Top Secret" clearances as of September 24, 1971. This figure did not include clearances issued by other government agencies. 118 CONG. REC. S-8855 (daily ed. June 6, 1972).

17. The new Executive Order (11,652) and implementing regulations call for isolation and identification of the items causing classification and of the persons who classify. See DOD Directive, 32 C.F.R. §§ 159.202, 202-1 (1973). However the old Executive Order (10,501) and implementing regulations also purported to require "component" classification but these provisions were generally ignored. The Pentagon Papers, for example, contained no component classification.

classification would require that all of the West system be classified Top Secret as well.

In those situations in which substantive standards for secrecy are applied, they turn out to be faint shadows of the limited definitions in the executive classification rules. Several national security experts who testified at the Ellsberg trial, men who had held high posts in the Pentagon and had constantly been generating Top Secret documents, had never so much as seen the governing executive order or been instructed on classification standards.<sup>18</sup>

As a defense to the Top Secret classification of the Pentagon Papers, government experts laid out their substantive theories for the need to protect the information. The chief government expert explained what I would call the vacuum cleaner theory of foreign intelligence. The "enemy" is assumed to have a voracious intelligence apparatus which gathers up all possible information about the United States which is then sifted and pieced together to form an intelligence picture. Any given piece of information not previously known to enemy intelligence might fill in the mosaic in some crucial way. Disclosure of United States intelligence information about enemy forces, for example, could seriously damage the United States even though the enemy obviously knows the status of its own forces. Such disclosure would permit the enemy to assess *our* intelligence. On the basis of such information he might improve his counter-measures or close off our intelligence sources. By contrast, disclosure of information about United States activities on subjects of interest to enemy intelligence would either give the enemy valuable information or, if the information were stale, permit the enemy to assess how good or how bad his intelligence had been, and, presumably, to take corrective measures. Thus, the experts explained, even information about long since completed military operations must be kept secret, lest the enemy be given the means to fine-tune its intelligence systems.

The government experts offered a similar theory to justify the secrecy of both military and diplomatic decisionmaking. Each side wants to understand the psychology of the other side's players. Therefore, information showing how our decisionmakers think would give the enemy an advantage.

These rationalia for secrecy have a certain logic, and it is apparently the case that many nondemocratic societies follow the dictates of that logic

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18. Dr. Morton Halperin, former Assistant Deputy Secretary of Defense, and Dr. Leslie Gelb, director of the Task Force which produced the Pentagon Papers, both so testified. Transcript of *Russo v. Byrne*, 409 U.S. 1219 (1972) (unpublished, in the Harvard Law Library).



with some attention. Yet it should also be clear that the logic is all encompassing, justifying secrecy of all past and present operations and decisionmaking relating to foreign nations. Reasons which compel openness of such information in a democracy are entirely overlooked.

Once information is classified Top Secret, it tends to remain in that classification. Until 1972 the governing executive order called for continuing review of all classified information for the purpose of declassifying or downgrading it whenever national defense considerations permitted. This provision, however, was a dead letter from the time it was written. No continuing review ever took place.<sup>19</sup>

Rules for automatic termination of secrecy after fixed intervals of time were introduced by executive order in 1964, but they have not been effective because classifiers are given discretion to exempt some categories of information from their operation. Experts on the classification system who testified on Dr. Ellsberg's behalf were certain that as long as any option was available to the classifier to exempt material from declassification he would use it freely. Those who classified the Pentagon Papers "TOP SECRET—GROUP I," for example, knew that "Group I" meant total exemption from declassification—in effect eternal secrecy. But they had no idea that according to the rules, the "Group I" category was supposed to be for material originated by foreign governments or organizations over which the United States has no jurisdiction, or for special communications intelligence or cryptography.

The results of this system are predictably chaotic. Intake into the system is voracious. Legitimate outflow through the prescribed process of declassification is utterly constipated. The system is now plodding forward with efforts to declassify World War II documents. The experts do not know how much classified information there is, but they know that it is continually expanding. They make estimates in millions of cubic feet of classified documents,<sup>20</sup> and agree that a vast proportion no longer remotely meets legitimate classification criteria, assuming that it ever did.

The major overflow of initially classified information takes the form of public and private disclosures by upper level executive officials. At upper executive levels the line between authorized and unauthorized disclosure is extremely uncertain. Technically any official has authority to declassify any information classified by people subordinate to him.<sup>21</sup> Thus when the President speaks, whether to the nation, to a reporter in private,

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19. *Hearings, supra* note 13, at 659 (testimony of David Cooke).

20. *Id.* at 658-59 (statement of David Cooke, Principal Deputy Assistant Secretary for Administration, Department of Defense).

21. Exec. Order No. 11,652, § 3(a), 3 C.F.R. 378 (1973).

or to a friend over cocktails, he automatically declassifies as he goes. There is no procedure, no paperwork. Declassification simply follows in his wake. The same is true for other officials so long as they do not stray from the pyramids of classified information which have been generated beneath them. Since no one keeps close track of what information has been disclosed by officials, vast amounts of documentary material remain stamped classified although the information has been made public.

In a sense this reflects the essence of the secrecy system. In practical operation it establishes initial information control over all national security related information, leaving it to the discretion of higher officials to determine what information should be disclosed in order to obtain acceptable levels of apparent candor and support. The system functions not to bind upper level executive officials, but to empower them to release only the information they choose.<sup>22</sup>

The bureaucratic tendency of self-protection creates a strong pressure toward ever broader practical interpretations of secrecy standards. Since secrecy classification is regarded as an inherent executive power, the practical expansion of standards goes virtually unchecked by outside review. Civil disobedience in the form of surreptitious "unauthorized disclosure" tends to be the only brake. Secrecy classification has thus become an executive bureaucratic system so uncontrolled that it threatens the working premises of democratic decisionmaking.

The result is that decisions of significance to the American electorate may be taken and implemented in total secrecy. Policies of great importance have been justified to the electorate by the Executive's disclosure of supportive classified information, while information which would support the political opposition has been kept secret. This was a major lesson of the Pentagon Papers with respect to the history of the Vietnam War. Yet as clear as the threats which the secrecy system poses are, the task of developing either judicial or legislative checks to executive secrecy power is exceedingly difficult. To approach this problem, we may initially inquire where the secrecy power falls on the spectrum of inherent powers.

Secrecy classification, on examination, would seem to be a power which the President can exercise until Congress stops him. Although there is no express constitutional delegation of secrecy power to the President, the reasons for implying such a power are strong. National security in-

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22. Hearings before the Foreign Operations and Government Information Subcommittee, *Hearings, supra* note 13, are replete with statements to this effect. See, e.g., *id.* at 3186-96 (statement of Rear Admiral Gene R. La Rogue (retired), May 24, 1972). Affidavit of Max Frankel, submitted in connection with 1 UNITED STATES V. NEW YORK TIMES COMPANY 396-413 (J. Goodale ed. 1971).

formation control is a function closely integrated with the President's express responsibilities as Commander-in-Chief as well as his foreign policy responsibilities. Moreover, the classification rules are house rules; they apply only within the executive branch.<sup>23</sup> The rules are established by executive order, not by statute. As such they apply only to executive employees and to those private citizens, mostly defense contractors, who agree to be bound to them by contract. The President issues orders of this type much as a corporation president issues orders binding his employees. Although the secrecy power has enormous effects on governmental decisionmaking, the effects are not focused on individual citizens. Issues about the validity of classification, therefore, are seldom framed in terms of conflict with individual liberty.<sup>24</sup>

Thus the President can persuasively argue that control of national information within the executive branch is so closely integrated with the proper functioning of the executive branch that no congressional authority is needed to establish a secrecy classification system.

On the other hand, since secrecy has such great effects on matters properly within congressional province, Congress could unquestionably exert its power to regulate classification by requiring disclosure when the interests of democratic decisionmaking so require. The obvious congressional interest in this area could be the basis for placing the secrecy power in the third category, that which requires congressional authorization. However, despite the possible efficacy of this result, Congress has taken no action in this respect. Indeed, the Freedom of Information Act, which establishes a public right of access to government information, expressly excludes classified information.<sup>25</sup> Ironically, this exclusion which was meant to establish a public right to know puts Congress on record for the first time as recognizing and deferring to the full sweep of executive secrecy classification.

The result was played out sadly in *EPA v. Mink*.<sup>26</sup> Thirty-two members of Congress brought suit under the Freedom of Information Act to obtain disclosure of a report which had been generated within the executive branch for the President on the controversial underground nuclear test known as "Cannikin" on Amchitka Island. The report was comprised of ten separate documents, six of which were classified. Congresswoman Mink and her colleagues wanted the documents submitted *in camera* to

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23. *Hearings*, *supra* note 13, at 780 (testimony of William Rehnquist).

24. *But cf.* *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

25. 5 U.S.C. § 552(b) (1) (1970).

26. 410 U.S. 73 (1973).

the trial judge so that he could determine which portions of the documents, if any, justified secrecy, and then to disclose the portions which did not.

The Supreme Court had no choice but to side with the executive branch. Mr. Justice Stewart noted in a concurring opinion that the Cannikin controversy was precisely the kind of event that should be opened to the fullest possible disclosure consistent with national defense:

Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.<sup>27</sup>

Nonetheless, Justice Stewart continued, Congress had built into the Freedom of Information Act

an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

. . . .  
. . . Congress chose . . . to decree blind acceptance of Executive fiat.<sup>28</sup>

Given the congressional concession of executive secrecy power, it makes no difference whether the secrecy power falls into the second or third category I have described. In either event, the Court could do no more than point out to Congress that it had the power to impose controls. The burden of cutting into the systems rests with Congress, and inertia seems to favor the classification system. The longer executive secrecy goes unchecked the less meaningful its already demeaned national security standards will become, and the more the system of secrecy will come to mirror the bureaucratic interests it can serve.

### *Possible Congressional Approaches*

Already one is hard pressed to conceive legislation which could control the existing system. Consider the various approaches Congress might pursue.

#### (1) Legislation to Reverse the Forces of Bureaucratic Inertia

Registration requirements as prerequisites for imposing a secrecy stamp would eliminate the virtual anonymity of the present system, in-

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27. *Id.* at 94-95.

28. *Id.* at 95.

roduce accountability, and make classification a more troublesome, hence perhaps less automatic, process.<sup>29</sup> Automatic declassification over a short period unless the classifier acted again at the end of the time interval would have a similar effect.<sup>30</sup> Likewise, sanctions on persons who overclassify or fail to declassify could create an incentive within the bureaucracy toward openness. The only sanctions in the present system, practically speaking, are for breaches of secrecy.<sup>31</sup> One might also consider an allocation system—a quota for each agency or office of how many documents can be kept under stamp at one time, leaving it to each office to clean out the old to make room for the new. A probably apocryphal story has it that abuses of classification were sharply curtailed one year as a result of a budget squeeze which led to a freeze in the Pentagon on the further purchase of Top Secret safes. These suggestions are attractive, but at best they would curb the quantity and not the quality of abuses.

## (2) Rules of Exclusion

The strategy here is to identify specific categories of information which are most vital to disclose but which are likely to be kept secret under the present system. Such categories would not include great volumes of information, but might include critical items concerning which the abuses of the current secrecy system are most serious. Having identified such categories, Congress could legislate flat mandates that any such information must be reported immediately to the electorate or to an appropriate body of the Congress. Congress could, for example, attempt to prevent recurrence of the secret invasions and bombings of the Vietnam War by mandating that, absent a declaration of war, the President must report immediately to designated committees of the Congress the presence of any

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29. The new executive order moves in this direction. Exec. Order No. 11,652, § 4(b), 3 C.F.R. 379 (1973); DOD Directive, 32 C.F.R. §§ 159.200, 201 (1973). But classification in spite of the rules of executive orders rather than in conformity to them has been the practice in the past. It is too soon to tell whether the rules of the new executive order will be effective.

30. Executive Order No. 11,652 provides an automatic downgrading schedule for Top Secret which would declassify after ten years. But the classifier may exempt information from the downgrading schedule altogether if it falls into described exemption categories. After ten years, exempted material may be reviewed on request if the petitioner for review can particularly identify the document. Exec. Order No. 11,652, §§ 5(A), (B), (C), 3 C.F.R. 380-81 (1973).

31. According to David Cooke, Deputy Assistant Secretary of Defense, between July 1, 1967, and June 30, 1971, there were 2,372 administrative penalties imposed on DOD personnel for failure adequately to protect classified information, none for excessive classification or excessive restriction on access to information. *Hearings, supra* note 13, at 2727 (letter from David Cooke to Chairman Moorhead). Exec. Order No. 11,652 provides no sanctions for overclassification.

American troops on or over foreign territory.<sup>32</sup> The difficulty here, however, is that this is a powerful but limited approach. The particulars are difficult to formulate, and undoubtedly hard to legislate.

### (3) The Use of Outside Review

Legislation could establish some device outside the executive branch for review of classified material. Yet sheer volume would prevent any agency from reviewing all of it. Some method for choosing which classified secrets should be reviewed is essential. One obvious answer is to limit review according to citizen demand, but this depends on reasonably well-informed citizen complainants. In other words, Congress could eliminate or modify the current exclusion in the Freedom of Information Act to permit review to be initiated by citizen demand, but most citizens would not know what to ask for. A system of public listings of classified documents, similar to a library catalogue, might be conceived, but such an approach would confront the present practice of classifying the titles of many documents as well as the contents. There are, of course, knowledgeable insiders who know what is being kept secret and may think it is wrong. The hardest of these "leak." But an external system of complaint and official inquiry would not provide the insiders an alternative to leaking unless they were prepared to suffer the bureaucratic consequences of openly confronting the system. One can conceive of anonymous or privileged complaint systems utilizing an ombudsman, but none which is realistic. All systems of review raise questions of who will clear the reviewers. A reviewing board of ex-generals would help very little,<sup>33</sup> while straight forward provisions for judicial review lead to raised eyebrows about the trustworthiness of the judges. The more acceptable the reviewer is to the national security establishment, the less effective one would expect the review to be.

No strategy will succeed completely. For every system that is brought under control a new secrecy system can be created. In fact, many already exist above Top Secret.<sup>34</sup> Each strategy of control can be circumvented by a bureaucracy sufficiently committed to secrecy as a means of protection and an instrument of power. This, in fact, signals the broad underlying problem. The national security bureaucracy has become tremend-

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32. This approach is advocated by Dr. Morton Halperin, now the director of the National Security Project of the A.C.L.U.

33. Exec. Order No. 11,652, § 7, 3 C.F.R. 383-85 (1973), provides for an inter-agency review committee made up of representatives from the Departments of State, Defense, and Justice, and the A.E.C., C.I.A. and N.S.C. *Id.*

34. There are, for example, higher than Top Secret classification categories for satellite photography.

ously strong and difficult to penetrate, insulated even from the operation of the rule of law. This might be tolerable if the values of the bureaucracy coincided with the values of our constitutional democracy, but unfortunately they diverge. The national security establishment trains men in the values of obedience, discipline, conformity, and ends over means. It suppresses the liberal values of openness, dissent, and morality of means. We see the flowering of this in both the Vietnam War and Watergate.

It is the character of the national security bureaucracy which makes effective disclosure legislation so difficult, and yet, so essential. Secrecy, like power, tends to corrupt. We expect an enormous amount of any President to manage and wield the powers of espionage, diplomacy and war, while at the same time maintaining scrupulous sensitivity to the values of democracy and individuality at home. Only by the assertion of democratic values by the other branches of government, as guides to which the Executive should conform, can we hope and expect that the national security agencies will not altogether lose sight of them.

#### FOREIGN INTELLIGENCE WIRETAPPING

Much less is known about foreign intelligence wiretapping than about secrecy classification. What we do know, however, suggests that the same elements which characterize the malfunctioning of the classification system carry over to national security wiretapping as well. These include: the bureaucratic pressure to expand the practice on the principle that information is always useful; a lack of standards for controlling the practice; and an absence of any meaningful review of the practice outside the executive branch. But the problems of national security wiretapping are set against a very different constitutional and legislative background than that of secrecy classifications, and this allows the courts to assume a more active role in checking abuses of the power.

The framework for considering the validity of an inherent executive power to wiretap in connection with foreign intelligence was set down by the Supreme Court in *United States v. United States District Court*,<sup>35</sup> the so-called *Keith* case involving domestic national security wiretaps on political groups. The case presents a marked contrast to *EPA v. Mink*, and nicely illustrates the judicial strategy of passing national security questions to Congress.

The Executive justified its unwarranted tapping of domestic political groups in *Keith* by the national security argument that subversive political groups must be stopped before they accomplish their intended subversion.

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35. 407 U.S. 297 (1972).

Since requiring the executive branch to amass enough evidence of subversive plots to meet the probable cause requirement for a judicial warrant would often have the effect of forcing the Executive to wait until the damage had been done, protection of national security, it is argued, requires the executive branch to conduct protective surveillance.<sup>36</sup>

The Supreme Court responded to this argument by differentiating between the warrant and probable cause requirements of the fourth amendment. It asserted that a judicial warrant is an essential precondition to any domestic wiretap. However, it stated in dicta that the procedures and standards on which the warrant would issue are subject to adjustment by Congress to meet the needs of national security. A result of this opinion is that the Executive is checked by the declaration that domestic taps require warrants under existing probable cause standards; and if the Executive wishes to lessen these restrictions, it must appeal to and convince the Congress. This result would, of course, have been impossible had Congress already recognized an inherent executive national security wiretap power as it had in the Freedom of Information Act. But Congress had, in fact, written a careful provision into its 1968 wiretap legislation saying that it meant neither to recognize nor to override any inherent executive wiretap power.<sup>37</sup>

The Court's invitation to Congress to dilute probable cause standards and to tailor warrant procedures to executive needs may dissatisfy fourth amendment purists, but in fact it is the strategic core of the opinion. It sets a strategy for dealing with the Executive's national security arguments which can be employed to deal with other forms of national security wiretapping. The *Keith* Court carefully left open the validity of inherent executive powers of surveillance and intrusion where matters relating to foreign powers are concerned,<sup>38</sup> and no case in the Supreme Court since *Keith* has dealt with taps relating to foreign affairs.

Following *Keith*, former Attorney General Richardson announced on September 12, 1973 that the Attorney General would continue to approve surveillance without warrant when convinced that

it is necessary (1) to protect the nation against actual or potential attack or other hostile acts of a foreign power; (2) to obtain foreign intelligence information deemed essential to the

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36. *Id.* at 319.

37. 18 U.S.C. § 2511(3) (1970); see *United States v. United States District Court*, 407 U.S. 297, 301-08 (1972).

38. 407 U.S. at 309 n.8, 321-22, 322 n.20.



security of the United States; or (3) to protect national security information against foreign intelligence activities.<sup>39</sup>

This amounts to an assertion of three separate inherent powers, the cores of which are taps to stop leaks of classified information, taps on spies and saboteurs, and taps on foreign missions, *i.e.*, embassies and diplomats. Each illustrates a different segment on the spectrum of inherent powers.

### *Leakers*

The Kissinger taps are the best known examples of taps to stop leaks. There were seventeen such taps, thirteen initiated against government employees and four against newsmen who obviously had excellent news sources within the administration. None of the seventeen persons had the slightest connection with any foreign intelligence organization.

It may not be immediately clear how the executive branch justifies these taps as necessary to protect national security information "against foreign intelligence activities." The reasoning is as follows: foreign intelligence organizations absorb information from American newspapers, and, therefore, it is essential to control leaks to the American press in order to prevent the leaked information from reaching foreign intelligence agencies.

The logic is impeccable, but like the vacuum cleaner theory of intelligence, it sweeps up too much. The logic, if followed to its natural conclusions, would give enormous range to the asserted foreign intelligence wiretap power. It could extend to any government official with access to classified information, any recently resigned government official who had had such access, all congressmen, a host of persons with access to classified information in private industry, and all persons, including newsmen, suspected of receiving classified information from unauthorized sources. Given the sprawling nature of the secrecy classification and clearance system, pretext could be found for tapping most persons associated with the government.

The inherent power to wiretap to stop leaks would, then, put into executive hands a tool with great potential for abuse. This includes the power to check a person's political loyalties or to gather information on political enemies, regardless of whether the person were truly suspected of leaking. If not subject to check by outside review, such wiretaps would remain entirely within the executive branch, not to be disclosed except

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39. Department of Justice, Press Release, Sept. 12, 1973, reproduced in 14 CRIM. L. REP. 2042 (1973). This enumeration tracks the language of 18 U.S.C. § 2511(3) (1970).

unwittingly in criminal cases<sup>40</sup> when the disclosures are unable to be presented by dropping the criminal prosecution. Even when the power is truly used to stop leaks, its purpose is still likely to be political. Obviously, presidents do not get upset over every leak of classified information to the public press. Leaks are everyday occurrences. It is the anti-administration leak, the politically embarrassing leak which causes presidents to smoke up the wires with orders to find the culprit—the leak of Westmoreland's request for 206,000 additional troops for Vietnam, the bombing of Cambodia, and the lie in the President's tilt toward Pakistan.

Interestingly, two of the Kissinger taps were on men who had security clearances but who had very little actual access to national security information. Two of the taps were on persons who were on the staff of the National Security Council when the taps were initiated but who soon left and became affiliated with political figures opposed to the Administration—one with Senator Fulbright,<sup>41</sup> one with Senator Muskie.<sup>42</sup> Yet the taps continued. The longest of the Kissinger taps was directed against one of these men, Morton Halperin.<sup>43</sup>

Unwarranted taps on newsmen illustrate the greatest threat. Even under *Branzberg v. Hayes*,<sup>44</sup> which eliminated the newsmen's privilege to protect his sources from judicial inquiry, the Supreme Court left room for newsmen to show that inquiries about their sources were made in bad faith for the purpose of closing off sources. Given the aspects of political information control which infect the security classification system, it is flatly unrealistic to assume that such a tapping power would be self-limited by the executive branch to good faith concerns for the protection of national security information.

What is the role of the Judiciary in checking such taps? As a legal

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40. Disclosure of the Kissinger taps was prompted by pressures from the Ellsberg case. Prior to trial the trial judge ordered the Justice Department to inform the defense whether the defendants, their lawyers or their defense consultants had been overheard on wiretaps. The Justice Department denied that either Ellsberg or Halperin had been overheard (both had been overheard talking on Halperin's tapped phone). Newspaper stories hinting at the Kissinger taps appeared in the Washington Post, May 3, 1973, at 1, col. 1. These prompted further defense motions and led to the internal investigation by Acting FBI Director Ruckelshaus which ultimately resulted in disclosure of the taps. *Hearings on the Nomination of William D. Ruckelshaus, of Indiana, to Be Deputy Attorney General Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 3-26 (1973) (explanation of William D. Ruckelshaus).

41. William Safire along with John Sears.

42. Richard Moose.

43. Morton Halperin. Coincidentally, his name appeared three times on White House political enemies lists, once with the notation "a scandal would be most helpful here." See *Hearings Before the Select Senate Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. 1695 (1973) [hereinafter cited as *Select Committee Hearings*].

44. 408 U.S. 665, 707-08 (1972).

matter taps to stop leaks are closely analogous to the unwarranted domestic national security wiretaps declared unconstitutional in *Keith*. The taps are on American citizens in this country having no connection whatever with foreign powers. They threaten well-defined first amendment interests. Indeed, the Executive's argument to support unwarranted tapping of leakers is similar to its argument advanced in *Keith*, i.e., leakers must be found and stopped before they go too far in compromising vital national security information, and this requires surveillance without establishing probable cause.

Given the general state of corruption of the classification system, this argument is not compelling. Its rejection, however, would necessarily involve the Judiciary in second guessing the Executive on the national security considerations which supposedly underlie a decision to wiretap. The strategy in *Keith*, however, would serve this case as well: insistence on a judicial warrant as a precondition to the wiretap, but suggesting that Congress could lower the probable cause requirement if it found the national security argument persuasive.

Preservation of the warrant requirement, even under greatly diminished probable cause standards, would still provide major safeguards against abuse. Fourth amendment rhetoric to the contrary, the essential protection of the warrant procedure does not lie in the neutral magistrate making a probable cause assessment. For example, of 816 applications for wiretap warrants during 1971, not one was denied. In 1972, of 860 applications, 855 were granted.<sup>45</sup> The essential check of the warrant procedure lies rather in its promise of executive accountability, and accompanying procedural controls. These protections in the present wiretap law are substantial, including requirements that the application for warrants be duly supported by affidavits,<sup>46</sup> that full records of the tap be kept,<sup>47</sup> tapes preserved,<sup>48</sup> the utility of the tap periodically reviewed,<sup>49</sup> the degree of intrusion minimized<sup>50</sup> (although courts are still struggling to articulate what this means),<sup>51</sup> and ultimate disclosure of the tap to the person who is the object of it.<sup>52</sup>

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45. ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, REPORTS ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS, 1972, 1973 (1973).

46. 18 U.S.C. § 2518 (1970).

47. *Id.* § 2518(8) (b).

48. *Id.* § 2518(8) (a).

49. *Id.* § 2518(5).

50. *Id.*

51. *E.g.*, *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973); *United States v. Scott*, 331 F. Supp. 233 (D.D.C. 1971).

52. 18 U.S.C. § 2518(8) (d) (1970).

The Kissinger taps illustrate the utter lack of procedural protections in the absence of such warrant procedures. The Halperin tap, for example, was requested, authorized, and installed all on the same day.<sup>53</sup> Such speed was possible because no real justification had to be prepared. Once John Mitchell initialled the request, an FBI agent called the Chesapeake and Potomac Telephone Company and orally directed the tap. The Telephone Company immediately installed the tap at its central switching board, wiring the Halperin's home telephone to a leased FBI line which runs from the Telephone Company office to the Old Post Office Building in downtown Washington, the Bureau's main listening post. In effect, the Telephone Company installed a remote extension on the Halperin's phone.<sup>54</sup> The Telephone Company never saw any authorization nor did it ever receive any written communication from the Bureau. It kept a minimal record of the tap while it was in place, but destroyed even that record when the tap was removed, as was their normal practice for such taps in the Washington area.<sup>55</sup> The tap remained in place for twenty-one months with no further review by the Attorney General of its necessity. Conversations, including those of Mrs. Halperin, perhaps also of the children, were taped and transcribed before the tapes were destroyed.<sup>56</sup>

The power to wiretap to stop leaks, like the power to tap domestic political groups, can and should be regarded as a power which can only be exercised by the Executive if authorized by Congress. While the power to classify national security information and refuse to disclose it to the public may be a power inherent to the Executive, the power to wiretap to protect it is at once more remote from protection of national security and more intrusive on individual liberties. In the absence of an emergency, there is no reason why the executive branch should be permitted to avoid justifying its general need for such taps to Congress and its particular need for a specific tap to a court. The tapping of suspected leakers, therefore, should be judged a power which is not inherent to the executive branch.

### *Spies and Saboteurs*

A claimed inherent executive power to wiretap spies would seem, at first, to stand on different ground. Tapping the espionage agents of foreign governments has a clear international character and seems a

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53. Deposition of William D. Ruckelshaus, *Halperin v. Kissinger*, Civil No. 1187-73 (Dist. Ct. D.C.).

54. Statement of Counsel for Chesapeake and Potomac Telephone Co., *id.*

55. *Id.*

56. Authority cited note 53 *supra*.

logical extension of our government's espionage and counterespionage program abroad. Agents of foreign powers engaged in spying might be thought to have diminished rights to claim the protections of our Constitution, and the national security dangers from successful spying might be seen as potentially very great. Thus at first glance, the case for an inherent executive power to wiretap spies seems a strong one, at least in the absence of congressional legislation barring or regulating such taps.

However on second look I conclude that the spy tapping power should be treated just as the power to tap leakers and domestic political organizations. Spying is covered directly by espionage laws,<sup>57</sup> hence traditional warrant procedures are fully available. If the subject's covert connection with a foreign power has been established, there seems no impediment to demonstrating this before a magistrate. If it has not been established, then there is no basis for affording the subject less than full constitutional protections, *i.e.*, requiring a warrant.

Most important, the foreign orientation of legitimate spy taps should not obscure the possible abuses of such taps. The standards which the Executive would be applying without review, assuming the inherent power were recognized, would have no hard edges. Insulated from review, one would expect the Executive to stretch the standards to their limits, just as it has done in other national security areas. Who is a spy? How much suspicion is needed? That John Ehrlichman justified the burglary of Dr. Ellsberg's psychiatrist's office by the need to find out if a foreign spy ring was involved in the Pentagon Papers case illustrates the expansiveness of this area.<sup>58</sup> In fact, Ehrlichman's response could be made in connection with almost any event adverse to the Administration.

There seems no real necessity for the executive branch to avoid judicial approval and review of its spy taps. The threat which such tapping poses to individual liberties is significant and has been demonstrated. Furthermore, the necessity for avoiding warrant procedures is unclear. Congress has already provided that in emergency situations the Executive can tap first and obtain a warrant later.<sup>59</sup> Absent any emergency, the Executive should hesitate to show probable cause only if the Executive does not trust the judge's decision. Perhaps this is an area where Congress might also wisely lower probable cause standards and permit the Executive to make its warrant application to a judge of its own choosing. But it

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57. See, *e.g.*, 18 U.S.C. §§ 793, 794 (1970).

58. *Select Committee Hearings*, *supra* note 43, at 2576-77, 2632, 2673.

59. 18 U.S.C. § 2518(7) (1970).

is, nonetheless, an area of executive activity for which the establishment and maintenance of a judicial check seem essential.

### *Foreign Mission Taps*

Taps on foreign missions—embassies and diplomats—present the strongest case for inherent executive power. Such taps are installed for the purpose of gathering foreign intelligence, not to catch criminals; thus there are no traditionally justiciable standards against which a magistrate could make a probable cause assessment, and none suggest themselves. Judges could do little more than determine whether an appropriate person in the executive branch had made the judgment that the tap would produce useful foreign intelligence information.<sup>60</sup> Such taps intrude upon private conversations, but the degree of intrusion is relatively low. Expectations of privacy are minimal in the diplomatic community. Notwithstanding reciprocal treaty agreements to respect the integrity and privacy of diplomats and embassies,<sup>61</sup> diplomats apparently expect all manner of surveillance as a part of the law of the international jungle.<sup>62</sup>

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60. *But cf.* United States v. Reynolds, 345 U.S. 1 (1952).

61. Vienna Convention on Diplomatic Relations, *open for signature*, April 18, 1961, T.I.A.S. No. 7502, 500 U.N.T.S. 75 [hereinafter cited as Vienna Convention]. Provisions of the treaty do not explicitly prohibit wiretapping if the installation of the tap does not involve a physical trespass. Article 22 provides:

The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

Article 27 provides:

The receiving State shall permit and protect free communication on the part of the mission for all official purposes. . . . The official correspondence of the mission shall be inviolable.

Article 29 provides: "The person of a diplomatic agent shall be inviolable. . . ." Article 30 provides: "The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." This treaty was ratified by the Senate on September 14, 1965, and ratified by the President on November 8, 1972. It entered into force with respect to the United States on December 13, 1972.

62. The Russians counsel their diplomats to assume that they will be overheard when they talk on the telephone. See A. ORLOVE, *HANDBOOK OF INTELLIGENCE AND GUERRILLA WARFARE* 114 (1965); O. PENKOVSKIY, *THE PENKOVSKIY PAPERS* 138-39 (1965). See also A. DULLES, *THE CRAFT OF INTELLIGENCE* 70 (1962). Ambassador Kennan, in his memoirs, suggests that American diplomats make the same reasonable assumption. See G. KENNAN, *MEMOIRS, 1950-1963*, at 135 (1973).

Sometimes diplomats even make use of the assumed tap as a way of communicating information to opposing governments. One of the toughest items from the Pentagon Papers to deal with in the Ellsberg trial was an item from the volumes chronicling United States diplomatic contacts with North Vietnam—a verbatim transcript of a telephone conversation between Alexy Kosygin in London and Leonid Brezhnev in Moscow. The text of the Pentagon Papers read as follows:

On the same day, Cooper reported that he had been told in the Foreign Office that: (a) between 3:00 a.m. and 3:47 a.m. London time (13 February) three priority "President's Cipher" telegrams were sent from the Soviet delegation in London to Moscow; (b) at 9:30 a.m. today according to a telephone intercept Kosygin called Brezhnev and said "a great possibility of achieving the aim, if

Members of foreign diplomatic missions, moreover, may have diminished standing to assert fourth amendment rights. As members of diplomatic missions they have diplomatic immunities which place them in a different legal position vis-a-vis the Constitution and domestic law than other aliens and citizens.<sup>63</sup> While we normally think of diplomatic immunity as a special protection, it can be seen also merely as insulation from the operation of domestic law whereby all but incidental problems of diplomatic missions are treated as matters for resolution between nations. The added protection of diplomatic immunity from the operation of domestic law would, in this view, carry with it a diminished capacity to claim the protections of domestic law, including the fourth amendment, against operations of the executive branch. Thus, while a tap on an embassy may give rise to a diplomatic complaint against the United States, it would not give rise to litigation in the domestic courts of either nation.

Foreign mission taps will pick up conversations of United States citizens who call into the tapped phone. Such citizens, of course, have undiminished fourth amendment rights. The question is whether the scope of those rights extends to calls made to foreign missions. Most calls to foreign missions are likely to be on business matters, and many persons calling foreign missions in this country may have no greater expectation of privacy than they would have if calling a foreign government office in a foreign country. The degree of intrusion from the incidental overhearings is likely to be far less than if the tap were on the citizen's phone. Nonetheless, while the significance of incidental overhearings of United States citizens may be discounted, they present the most serious conceptual problem to the recognition of an inherent power to tap foreign missions.

Of key importance is that foreign mission taps are not subject to infinite expansion and gross abuse. Whereas a tapping power which could be directed at suspected leakers or suspected spies would, as a practical matter, give the executive branch power to tap almost anyone for any pur-

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the Vietnamese will understand the present situation that we have passed to them; all they need do is give a confidential declaration.

— UNITED STATES—VIETNAM RELATIONS 1945-1967: NEGOTIATION CONTACTS—SUNFLOWER 61-62 (196 ), in record of United States v. Russo and Ellsberg, No. 9373-WMB-CD (C.D.Cal. 1972) (transcript on file at Harvard Law School). Apparently Ellsberg had blown a wiretap. Our investigation into the circumstances of the call convinced us, and I hope we convinced the jury, that Kosygin made his call on an open line from his room in Claridge's Hotel, cognizant that the British and American governments would know in the most credible way that he was actually conveying back to Moscow the messages he had told the British and Americans he would communicate. A short time later he went to the Russian embassy in London and sent a coded message to Moscow, evidently to convey information that he did not want overheard.

63. Vienna Convention, *supra* note 61, arts. 31-41.

pose, a tapping power limited to embassies and persons with diplomatic immunity has bright lines at its edges. The category of persons subject to such taps is limited in a manner that does not permit discretionary expansion at the margins. Also, it is made up of persons who offer little incentive for tapping other than for the foreign intelligence purposes which justify the power.

The executive branch will not state publicly that our government taps foreign embassies and diplomats. The niceties of international discourse prevent that. If challenged, however, the Executive would doubtless claim great utility for such taps. One can also picture the counterclaims. The very fact that diplomats expect to be tapped may mean that the tappers seldom overhear anything but routine embassy business and chitchat. On the vacuum cleaner and personality approaches to intelligence gathering, everything is valuable. But whether such value is real or offsets the fourth amendment interest at stake is another question. Ramsey Clark, based on his exposure to such taps while Attorney General, sharply questions their utility. He stated:

I know that not one percent of the information that is picked up has any possible utility. It would only be an act of extreme carelessness or extreme urgency that would cause the use of a channel that is assumed by reasonable people in the foreign missions in this country to be under surveillance.<sup>64</sup>

Asked what impact on national security would follow from a discontinuation of all such taps, Clark answered, "absolutely zero."

A direct clash of views on the utility of embassy taps is precisely the kind of national security question which courts would have great difficulty in litigating and evaluating, especially if the outcome were to be a rejection of the Executive's national security arguments. This suggests that the *Keith* strategy of shunting the national security questions to Congress might be appropriate. The problem, however, is more complex here. Congress is in no better position than the Executive to make a public declaration that foreign mission taps are acceptable. Yet Congress cannot delegate power secretly. Although congressional hearings may be held in executive session, Congress must pass a public statute, if it wishes to regulate the warrant procedures and adjust the standards of probable cause to suit the Executive's needs. Lower courts, when confronted with embassy taps,

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64. *Hearings on Practices and Procedures of the Department of Justice for Warrantless Wiretapping and Other Electronic Surveillance Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 53 (1972).



have faced similar problems of public articulation. They have resolved them by adjudicating the legality of embassy taps *in camera*, and delivering opinions which neither identify the locus nor the specific nature of the tap. Such an approach is possible only if the judicial outcome is to uphold the legality of the unwarranted taps. Thus, where foreign mission taps are concerned, the *Keith* approach is not truly available.

The courts, then, must directly resolve the conflict between national security and individual liberties which foreign mission taps present. On the one hand, there is no way to finesse the problem of judicial competence to weigh national security claims. This must be weighed against the limited and relatively mild intrusions on individual liberties which such taps entail. The balance thus supports finding an inherent executive power to undertake such taps, subject to control by the Congress if it chooses to assert it. This is an acceptable, albeit uncomfortable, outcome precisely because this executive power, unlike the powers of secrecy classification, leak-tapping and spy-tapping, does not pose the kind of threat to democratic principles which demands an outside check.

#### CONCLUSION

Secrecy and wiretapping are by no means the only national security powers which demand control, but they do illustrate the great extent to which the political advantages of information control can lead the executive branch to corrupt national security standards and to override individual liberties. They illustrate, also, possibilities and difficulties of bringing national security powers under control, and the extent to which the task of doing so is shared and divided between Court and Congress. The Vietnam War and Watergate may mark an end to the cold war era. Both seem to be ultimate expressions of a cold war mentality, revealing the threats of rampant secrecy and unchecked executive powers to conduct covert operations. The hallmark of the cold war era has been a willingness to compromise basic American ideals to the supposed necessities of national security. Perhaps Vietnam and Watergate will sufficiently discredit the mystique of national security to permit a resurgence of those ideals.